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(02-5095)

Supreme Court, U.S.
FILED
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No. 02-19

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

JAMES SCHOMIG

Petitioner,

Vs.

WILLIAM BRACY

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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I. The *En Banc* Court of Appeals Did Not Violate This Court's Mandate

There are two reasons why the State is incorrect in arguing that the *En Banc* Seventh Circuit violated this Court's mandate, which purportedly requires proof of actual bias in Petitioner's own case.[1] The first is that there was no such mandate. In its previous opinion in this case, this Court deferred elucidation of the Due Process standard and focused instead on the issue of discovery. *Bracy v Gramley*, 520 U.S. 899 (1997) While the Court stated that Petitioner would prevail if he succeeded in proving actual bias in his own case, it never held that this was the exclusive means by which he could establish a Due Process violation anymore than it held that Petitioner could prevail only if he proved that the Petitioner's trial counsel was Thomas Maloney's former law partner. If the mandate of the Court had been made as clear as the State now suggests, then the opinions of the Seventh Circuit Judges would never have diverged as sharply as they did on this issue and there would have been no arguable basis for the dissenting opinion that proof of temptation to be biased is all that the law requires. See Dissenting opinion of Judge Rovner, *Bracy v. Schomig*, 286 F.3d 406, 433 (7th Cir. 2002). The second reason why the State's claim is unfounded is that the Seventh Circuit plurality applied an actual bias standard and sustained the District Court's finding that Thomas Maloney was biased in Petitioner's own case. Id. at 418. The State is thus reduced to quibbling with the

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[1] The State appears to take an even more extreme position in arguing that Respondent can only establish a Due Process violation if he presents direct evidence of bias. See, Petition at 9. In other words, short of a confession by Thomas Maloney, Respondent could not hope to establish a Due Process violation and thus there would have been no reason to order discovery. However, this view of the law was rejected when the Court reversed the Seventh Circuit's earlier decision denying discovery.

evidence although it totally fails to explain why the evidence is insufficient under the clear error standard of Federal Civil Rule 52(a).

II. There Was Ample Evidence to Support The Findings of Actual Bias

In spite of the State's claim to the contrary, there is ample evidence to support the finding of actual bias, not the least of which is an official Government report (unchallenged in the District Court) which concluded that Thomas Maloney regularly engaged in compensatory bias as a means to further his racketeering scheme.[2] While it is true that much of the evidence was indirect and circumstantial, this case is no different than any other case in which motive or intent are in issue, in which it is customary for the fact finder to rely on circumstantial evidence. Maloney's questionable rulings in the sentencing phase (as well in the in the guilt phase) are part of the body of circumstantial evidence which support the finding of actual bias, although by themselves they are not an appropriate basis for affirming the conviction or setting it aside. By asking this Court to second guess the District Court and the Court of Appeals, and assume the role of fact finder, the State fails to present a cert worthy question under Supreme Court Rule 10(c).

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[2] When this case was last before this Court, there was no clear evidence that Thomas Maloney ever engaged in compensatory bias and thus it may have been appropriate to wonder whether Maloney's bribe taking led him to be pro-prosecution or pro-defense as a means of concealing his corruption. Subsequent to remand, the District Court made a finding that Maloney engaged in pro-prosecution compensatory bias in Petitioner's own case, which was based upon information gathered in discovery, including specific examples of compensatory bias in other cases as well as the official Government report which found that Maloney regularly engaged in compensatory bias as a means to conceal his corruption and to encourage others to pay bribes.

III. Conclusion

Respondent concurs with the State's suggestion that the Court should review this case, but not for the reasons set forth in the Petition. Respondent maintains that both the standard and method of proving a Due Process violation in judicial corruption cases are unclear and that the law in this area should be settled by the Court. Respondent maintains that if actual bias is the standard, there was ample evidence to support the District Court's determination that it existed in this case. However, once having found the existence of bias, the Seventh Circuit plurality disregarded established Supreme Court precedent and improperly relied on harmless error analysis to affirm the conviction. Finally, Respondent maintains that contrary to the position of the State and the Seventh Circuit plurality, an interest in the outcome of the case is by itself sufficient to establish a Due Process violation.[3] These are the reasons why Respondent's petition, which as been separately filed in this case, should be granted. However, the State's petition is based upon an erroneous assumption as to what the Court previously held in this case, as well as the incorrect assertion that the lower court's finding of actual bias is properly subject to challenge in the absence of clear error. The State's petition should therefore be denied.

Respectfully submitted this 23rd day of July, 2002.

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[3] The existence of Maloney's interest in the outcome of Respondent's case was proved in the District Court through the uncontested evidence that he regularly used his office as a means to further his racketeering scheme, even in those cases in which he did not receive bribes.

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

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Please take notice that I have filed the required number of copies of the Brief in Opposition with the United States Supreme Court, copies of which are hereby served upon you, by mailing from Seattle, Washington, first class postage prepaid on the 23rd day of July, 2002.

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